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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 244.

SECURITIES AND EXCHANGE COMMISSION, EDMOND M. HANRAHAN, RICHARD B. MCENTIRE, HARRY A. MCDONALD, and PAUL R. ROWEN, *Petitioners*,

v.

OTIS & CO., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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September, 1949.

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OTIS & CO., *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI*

Otis & Co., respondent herein, respectfully submits that the petition for a writ of certiorari should be denied for the reasons set forth below.

COUNTER STATEMENT OF FACTS

The facts are set forth in the complaint (R. 2-10) and in affidavits in support of a motion for injunction (R. 49-65).

Respondent is an investment banking house with its main offices in Cleveland, Ohio (R. 2). It was one of the underwriters of a proposed issue of stock of Kaiser-Frazer Cor-

* Page references (R. —) are to the Joint Appendix. Emphasis is supplied except as otherwise indicated.

poration. On February 9, 1948, the settlement date specified in the underwriting agreement, Otis terminated its obligations thereunder for a number of reasons. (R. 4). Among the latter was non-compliance with a requirement that no material litigation be pending against Kaiser-Frazer. Such non-compliance was due to a stockholder's derivative suit filed by one Masterson shortly before the time fixed for settlement (R. 4).

Within a few days Kaiser-Frazer filed suit against Otis in New York charging breach of the underwriting agreement. (R. 4, 54). One of the allegations in that case is that Otis, acting through Eaton, one of its principal stockholders, caused Masterson to file his suit in order to provide a basis for Otis' termination of the agreement. (R. 4).

Although that issue would presumably be determined in that action, the SEC commenced an investigation of the charge on the ground that it might involve violation of the securities laws. (R. 5, 11-14). The ordinary conclusion of such an investigation is either a closing of the file, or the institution of formal proceedings if probable violation has been found (R. 5). The Commission did neither. Instead, it issued an "Order for Public Investigation" of the same matters (R. 5, 15-17). Hearings were held in eight cities, ranging from New York to California, and a record was made consisting of some 5000 pages of testimony and hundreds of exhibits (R. 37, 56). Otis was not permitted to cross-examine witnesses nor to introduce testimony (R. 5, 62, 63).

At the apparent conclusion of the "public investigation" the Commission ordered a further hearing in Washington and recalled two of the witnesses, Harrison and Hull, who had previously testified that they were attorneys for Eaton. They were questioned concerning their conversations with their client, which they refused to disclose on the ground of attorney-client privilege. The presiding officer then announced that the Commission had instructed him to direct

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the witnesses to answer these questions because the Commission found that the evidence in the record established *prima facie* that the attorneys had participated with Eaton in the accomplishment of a fraudulent purpose, namely, the instigation of the Masterson suit (R. 5, 6, 60, 61). The lawyers continued to decline to testify (R. 6).

The Commission then filed a complaint against Harrison and Hull in the United States District Court for the District of Columbia (R. 6). The complaint (R. 18-22) recited the nature of the investigation, the Commission's conclusion as to the facts, the direction by the presiding officer and the refusal of the witnesses to answer, and it prayed for an order directing them to appear before the Commission to answer the questions. Otis and Eaton were permitted to intervene (R. 36). The action was heard by Judge Morris on July 19, 20, and 21, 1948. The Commission offered the entire record of its public investigation in support of its complaint (R. 37). Thereafter the cause was extensively briefed, and was decided by Judge Morris on October 18, 1948 in a memorandum (R. 34-45) which was later designated as his findings of fact and conclusions of law (R. 45). On the basic issue he found that the circumstances proved would not "reasonably justify a verdict of wrong-doing which could be sustained, and I, therefore, must conclude that the requisite *prima facie* showing of fraud * * * has not been made", and that therefore the relief prayed for by the Commission must be denied (R. 43, 45). Judgment was entered accordingly (R. 45-46). No appeal was taken, and the judgment has become final.

Although the Commission was and is free to pursue its investigation further, there have been no hearings since the record was submitted to Judge Morris. However, on August 11, 1948, while the action before Judge Morris was being briefed, the Commission began a proceeding against Otis to revoke its broker-dealer registration on the ground that "as the result of a public investigation" the Commission had obtained information which if true showed that

Otis had inspired the Masterson suit. (R. 6, 7, 23-29)[1] This was done despite the fact that just a few weeks earlier the SEC had assured Judge Morris that it needed the testimony of Harrison and Hull to determine whether it should commence such a proceeding (R. 9, 63).

The SEC refused Otis' request to postpone hearings pending decision by Judge Morris in the action which the SEC had itself brought and which had already been heard. An injunction pending that decision was granted by Judge Letts in the absence of Judge Morris (R. 31-32). However, on the very day that judgment was entered in that action by Judge Morris, and despite the character of that judgment, the SEC directed that hearings proceed under its order of August 11 (R. 8, 47-48). The present action was then commenced to enjoin that proceeding on the ground that the question proposed to be tried had already been adjudicated against petitioners; that the Commission had no evidence additional to that which it had presented in its own action; and that prosecution of the proceeding would cause respondent irreparable injury (R. 8-10). An injunction *pendente lite* was applied for (R. 48, 49).

The SEC did not answer the allegations of the complaint and the affidavits. Instead, it moved to dismiss the complaint on the ground that the court did not have jurisdiction of the subject-matter and that the complaint failed to state a cause of action (R. 58). The district court dismissed the complaint (R. 67, 68), but was reversed by the Court of Appeals in a unanimous opinion (R. 72-86). The relief to which respondent was held entitled is set forth in the last paragraph of the petition, as follows (R. 86):

> "The order dismissing the complaint will be set aside and the cause will be remanded. The appellee [SEC] will then have an opportunity to answer and to deny

[1] There were other charges, but they are not involved in the present action because no relief was sought against them. The SEC has chosen not to sever these charges or to hear them separately.

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the allegation that no additional evidence concerning Eaton's collusion will be introduced at its new hearing, and so be relieved of the bar of res judicata."

REASONS FOR DENYING THE WRIT

The two questions which petitioners seek to present to this Court are whether the judgment in the prior SEC action had any binding effect as between the parties thereto, and, if so, whether the court below was nevertheless without jurisdiction to grant the relief set out in the quoted passage.

These questions are neither novel nor important. The attempt to make them appear otherwise is based on inapplicable decisions, and on elaborate hypothetical situations. The decision of the court below is merely that petitioners may not, without additional evidence, retry before themselves a simple issue of fact adjudicated against them in a forum of their own choosing. That decision is a plain application of settled legal principles uniformly adhered to by this Court, does not affect any legitimate administrative function, and has little prospect of future application. Review by this Court is not required in the public interest, and prolongation of the controversy would cause respondent incalculable and unjustified harm.

I. The Commission is Simply Endeavoring to Retry Before Itself, Without Additional Evidence, an Issue Finally Decided Against It in the Courts.

The prior SEC action to enforce its subpoenas against Harrison and Hull was a plenary action in which the judgment is "conclusive upon the parties until reversed" (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 487). That petitioners had their day in court appears from the recitals of that judgment, which petitioners themselves approved as to form (R. 45).

The court in that action found and concluded as follows (R. 43):

> "It is insisted that inferences should be drawn from the evidence that Eaton, through the defendants and others, inspired and induced the filing of the Masterson suit . . . I do not consider the circumstances here proved to be such, *without more*, as to reasonably justify a verdict of wrongdoing which could be sustained and I, therefore, must conclude that the requisite prima facie showing of fraud . . . has not been made . . ."

The record here is plain that petitioners in fact seek "without more" to relitigate the issue of whether respondent induced the filing of the Masterson suit. Not only must this allegation be accepted as true for purposes of the motion to dismiss, but the petition concedes, albeit cautiously, that such in fact is the case, stating (Pet. 19, n. 9):

> "While the petitioners have not yet answered the allegation that there is no 'new evidence' and while they do not mean to imply that they will admit that allegation, it may be inferred from the history of this proceeding that the petitioners know of no startling piece of 'new evidence' whose production in the District Court would result in a final judgment for them under the decision below, and hence render academic the question raised by this petition."[2]

This concession was not made in the court below, but petitioner's position was made clear by their insistence that they should be permitted to proceed with their hearing be-

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[2] Petitioners appear to be offended at the requirement that, like other unsuccessful litigants, they make a showing of new evidence in support of a second trial. Other agencies have not hesitated to do so, e.g., the National Labor Relations Board in *International Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335. The requirement is not burdensome, since only the *prima facie* character of the new evidence is involved. The suggestion that petitioners will have to submit to examination is fanciful, and the grievance would appear to be academic in view of the concession.

cause the same evidence, even though it failed to show a *prima facie* case of wrongdoing, might nevertheless be sufficient to avoid reversal under the substantial evidence rule.[3] The petition now purports to abandon this argument[4] but it does not suggest any other reason why petitioners wish to conduct their administrative hearing when their entire evidence is insufficient to constitute even a *prima facie* case of misconduct. Yet the right to conduct such a hearing is the maximum relief which petitioners seek from this Court, since, if they find additional evidence, they are free to proceed under the decision of the court below.

II. The Decision Below is an Ordinary Application of the Principles of Res Judicata.

It is settled beyond dispute that the Government as a litigant is entitled to the benefits of adjudications in its favor and is bound by adjudications adverse to it (*Southern Pacific Railway Co.* v. *U. S.*, 168 U. S. 1; *Sealfon* v. *U. S.*, 332 U. S. 575). The rule is the same where the Government is represented by an administrative agency (*Sunshine Anthracite Coal Company* v. *Adkins*, 310 U. S. 381; *Tait* v. *Western Maryland Railway Company*, 289 U. S. 620; *International Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher Mining and Smelting Co.*, 325 U. S. 335; *George H. Lee Company* v. *Federal Trade Commission*, 113 F. (2d) 583 (C. A. 8, 1940); *United States* v. *Willard Tablet Co.*, 141 F. (2d) 141 (C. A. 7, 1944).

The last two cases, which did not reach this Court, require comment for that very reason. In the *Lee* case, a judgment for defendant in an action by a United States Attorney under the pure food laws was held to bar trial of the same fact issue by the Federal Trade Commission

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[3] This argument was the cause of the discussion by the Court of Appeals of the nature of substantial evidence (R. 83-86), now criticized in the petition (Pet. 15, n. 6).

[4] Ib.

under the laws administered by it. In the *Willard Tablet* case the situation was reversed. Both are more dramatic instances of res judicata than the case at bar. But in neither was certiorari sought by the Government, presumably because the law was too well-settled to warrant seeking review by this Court.

In their effort to justify review in *this* case, petitioners seek to create issues where none exist. Their principal contention appears to be that a judgment in a subpoena-enforcement action is not entitled to the same force as other judgments. This is in the teeth of overwhelming authority. The prior subpoena-enforcement action was an ordinary civil action governed by the Federal Rules of Civil Procedure (Rule 81-a-3). It began with a complaint, proceeded with the reception of evidence, next with findings of fact and conclusions of law (as required by Rule 52 in actions tried by the court without a jury) and ended in a judgment, which was, even before the Federal Rules, subject to appeal "as much as an independent suit in equity" (*Cobbledick* v. *U. S.*, 309 U. S. 330).

Petitioners say that judgment in such an action is "ancillary" or "auxiliary" or "preliminary". But this Court has said exactly the contrary: " • • • that determination *will not be merely ancillary and advisory*, but, • • • will be 'a final and indisputable basis of action' as between the Commission and the defendants, and will furnish a precedent in all similar cases." (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 487; *accord: Interstate Commerce Commission* v. *Baird*, 194 U. S. 25; *Federal Trade Commission* v. *Claire Furnace Company*, 274 U. S. 160; *Cobbledick* v. *U. S.*, 309 U. S. 323).

Similarly, petitioners' effort to analogize the situation here to certain preliminary proceedings in criminal cases is refuted by the very authorities cited. Thus, in the language of this Court in *United States ex rel. Rutz* v. *Levy*, 268 U. S. 390, 393, such proceedings "are not a trial in any sense". Cf. *Todd* v. *United States*, 158 U. S. 278. In

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marked contrast, the previous subpoena-enforcement action in this case was a trial in every sense.[5]

Petitioners also urge that this Court should deny binding effect to adjudications in subpoena-enforcement actions on the ground of necessity. They argue that otherwise subpoena-enforcement actions may become traps for unwary administrators and result in frequent trials by the courts of issues which ought properly to be tried before the agencies themselves.

The picture is, to say the least, overdrawn. The Court will no doubt take judicial notice of the able legal representation of the federal agencies. But even without such representation, the imagined consequences would not follow. A subpoena-enforcement action, like any other action, can only be a bar as to matters alleged and decided. In the ordinary subpoena-enforcement action, the sole function of the court is to determine the general authority of the administrative agency to conduct the inquiry, and no showing of "probable cause" by the agency is required (*Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186).

The instant case is, so far as counsel can discover, the only subpoena-enforcement action in which it was necessary to try an issue of fact. Although it is possible that other cases involving issues of fact may arise in the future, it is plain from the inherent circumstances that they will be rare indeed. If an issue is tried in the exceptional case—of which this is the only one thus far—there is no reason whatever why it should be retried in another forum.[6]

There is nothing to the contrary in *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, and related cases, nor in the concept of primary jurisdiction (Petition 10-15).

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[5] In criminal cases also, independent proceedings which result in appealable orders are likewise *res judicata*. *Steele* v. *United States*, 267 U. S. 505. *Cf. Cogen* v. *United States*, 278 U. S. 221.

[6] The same rule has applied in other cases of "exclusive" jurisdiction, e.g., bankruptcy. Cf. *Pepper* v. *Litton*, 308 U. S. 295 with *Heiser* v. *Woodruff*, 327 U. S. 726.

The *Myers* doctrine condemns attempts to compel administrative agencies to try in the courts issues the trial of which in the first instance has been committed to the agencies. But the case at bar does not involve trial of an issue in the first instance. That trial has already been had. To be sure it took place in the district court rather than before the Commission, but this was done on the Commission's own complaint, filed pursuant to express statutory authority. In trying that issue the district court was not interfering with the Commission's prerogatives; it was merely discharging a duty which the Commission itself thrust upon it.

Important questions involving administrative agencies are not infrequently settled in actions in which the agencies have not acted as the tribunal. A recent instance is *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company* (— U. S. —; decided June 20, 1949). The contention that an agency should be free to retry before itself an issue so tried and adjudicated, finds no support in the *Myers* case or elsewhere, and does not warrant review by this Court.

III. Injunctive Relief is the Standard Remedy for Attempts to Relitigate Issues Already Decided.

It is well settled that a court which has decided an issue will enjoin a subsequent attempt to relitigate that issue. (*Root* v. *Woolworth*, 150 U. S. 401, 411-14; *Kessler* v. *Eldred*, 206 U. S. 285; *American Brake Shoe & Foundry Company* v. *Interborough Rapid Transit Co.*, 136 F. (2d) 681 (C. A. 2, 1943) cert. den., 320 U. S. 756, 794). As the court said in *Root* v. *Woolworth*, supra:

> "The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance, in order to avoid the relitigation of questions once settled between the same parties, is well settled."

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Here, again, petitioners ask this Court to carve out an exception for this case, on the ground that injunctive relief is an undue interference with the administrative process in violation of the *Myers* and similar cases. Such an exception is not supported by anything considered in those cases, and it is in direct conflict with the principle expressed by this Court in *International Union* v. *Eagle-Picher Mining & Smelting Co., supra,* that "Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation. The party adverse to the administrative body is entitled to rely on the conclusiveness of a decree entered by a court to the same extent that other litigants may rely on judgments for or against them." A similar plea, in reliance upon the same cases, was recently rejected (*Federal Power Commission* v. *Panhandle Eastern Pipe Line Company, supra*).

The suggestion that res judicata can be pleaded before the agency is not novel. In every case where relitigation has been enjoined res judicata could have been pleaded before the second tribunal. But it is the tribunal familiar with the controversy and whose decree is to be respected which is the proper one to grant relief.[7] A basic objective of the doctrine of res judicata would be frustrated if relief can be obtained only after suffering the full injury of a second trial. As this Court stated long ago in *United States* v. *Throckmorton,* 98 U. S. 61, 65:

> "There are no maxims of the law more firmly established or of more value in the administration of justice than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely: 'interest reipub-

[7] Recent legislative action to the same effect, in amending former Sec. 265 of the Judicial Code, is discussed in the opinion of the Court of Appeals (R. 79, n. 3).

licae, ut sit finis litium, and Nemo bis vexari pro una et eadam causa'."[8]

Adherence by the court below to these principles surely does not call for the intercession of this Court.

CONCLUSION.

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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[8] Cf. *George H. Lee Co.* v. *Federal Trade Commission, supra,* (113 F. (2) at 586):

> "Unless a question which a court or an administrative board has power to decide is to be regarded as conclusively settled as between the parties by the final decree of the court or the final order of the board, there can be no end to a controversy except as the result of the financial disability of one of the parties."

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PETITION FOR RECONSIDERATION.

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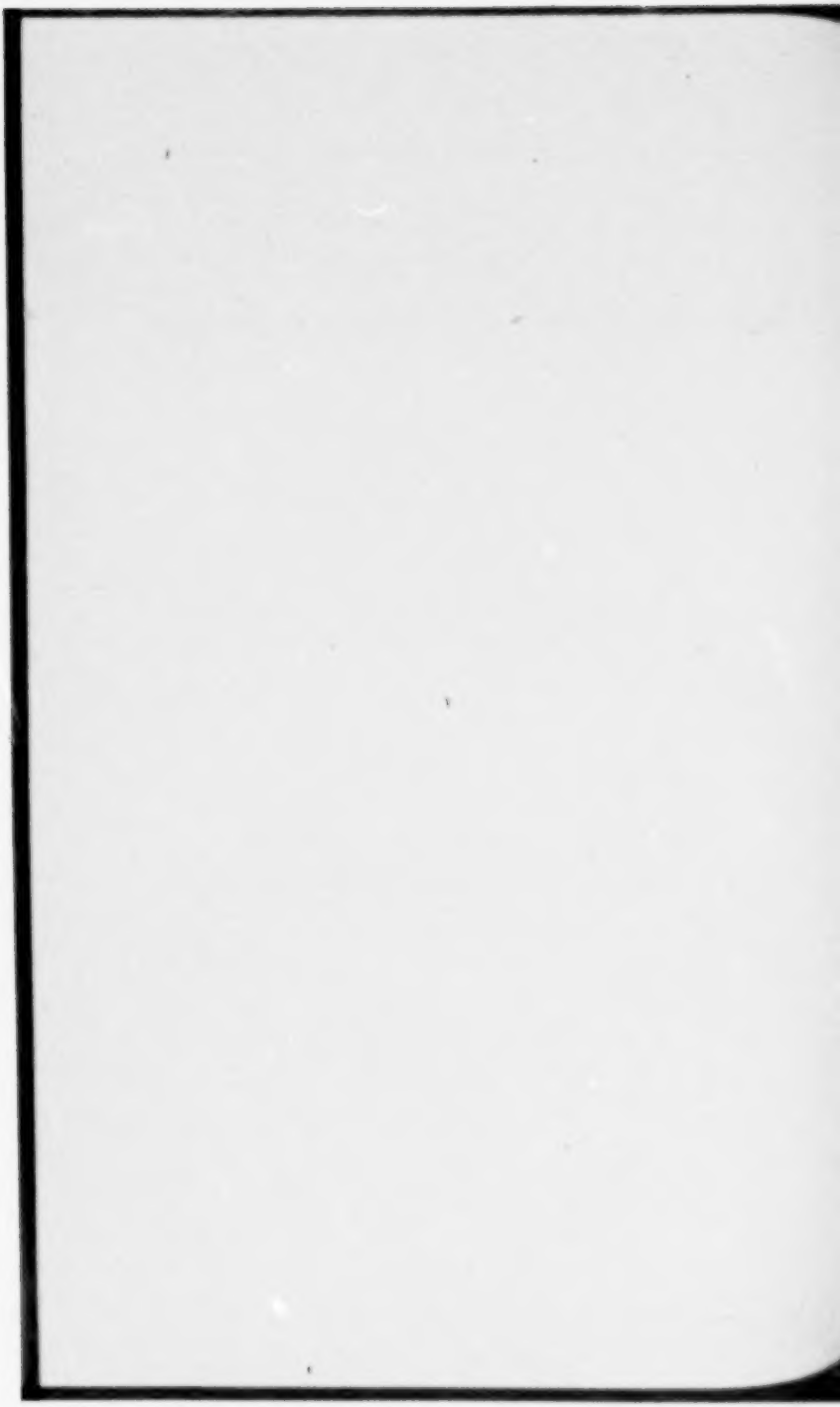

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v.

OTIS & CO., *Respondent.*

PETITION FOR RECONSIDERATION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, Otis & Co., respectfully requests the reconsideration by the Court of its action in reversing the judgment of the Court of Appeals in this matter without oral argument and without briefs on the merits, and respectfully requests that the matter be set down for argument in this Court and that the filing of briefs be permitted in the normal course.

Otis & Co. by the summary action of the Court has been deprived of any opportunity to argue to this Court the

merits of its position on the issue thus decided by this Court.

The rules of the Court (Rule 38, paragraph 5) specifically point to the considerations which must be stressed in petitioning for certiorari and consequently in opposing the grant of certiorari. These criteria make it clear that the question of grant or denial of certiorari is based on considerations independent of the merits of the particular action. See *House* v. *Mayo*, 324 U. S. 42, 48: "But as we have often said a denial of certiorari by this Court imports no expression of opinion upon the merits of a case. . . ." See also *United States* v. *Rimer*, 220 U. S. 547, and *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, holding that where on argument it appears that the issue is not of public importance, it is the court's "duty . . . not to pass upon the merits of the case, but to dismiss the writ . . ." (220 U. S. 547, 548). Both the latter cases are cited in paragraph 2 of Rule 38 of the Rules of this Court.

The Court has itself stated that it cannot critically examine the many records presented to it and "must rely very largely upon preliminary papers." *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, cited in paragraph 2 of Rule 38 of this Court. The Court has advised that in the light of its heavy docket and need for prompt attention, petitions should be accurate, *brief* and clear. *Furness, Withy & Co.* v. *Yang Tsze Insurance Assn.*, 242 U. S. 430, cited in paragraph 2 of Rule 38.

The petition of the government in this case consequently stressed not the merits of the issue but merely argued that "a novel and important question" was raised (Petition p. 10). In reply our opposition brief was a mere twelve pages, and argued that the questions were "neither novel nor important" and that the case was a unique one having "little prospect of future application." (Brief, p. 5.) Neither party presented the merits of its argument, except incidentally. Both understood that if the Court regarded the question as not important, argument on the merits would

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be unnecessary and that if the Court regarded the question as involving a matter of consequence, both sides would then have adequate opportunity to be heard on the merits.

In *FCC* v. *WJR*, ... U. S. ...., 69 S. Ct. 1097, decided June 6, 1949, the Court held that oral argument was not a necessary element of due process. But it clearly indicated that the agency must grant the parties an "opportunity to present for . . . consideration any matter of fact or law in connection with its application . . ." And the Court held that where the parties had adequate notice of the issue before the Commission and could direct written argument to that issue on the merits, due process of law had been observed.

On the contrary, counsel in the present case, pursuant to the policy suggested by the rules of this Court, refrained from directing argument to the merits. This was done in an effort to aid the Court in deciding whether it should exercise its discretion to grant or deny review by the criteria set forth in its Rules. In such a case, it seems both unfair and not in accordance with traditions of due process to decide the case without permitting some opportunity to respondent to present its argument on the merits.

This is especially true where the government in its petition has not asked for reversal as well as the grant of certiorari. Had it done so respondent would have been on notice of the possibility of final disposition and would have had an opportunity to direct argument not only to the request for certiorari but also to the request for reversal. But where no request is made by any party for a decision on the merits and no briefs are presented on the merits, the respondent had been deprived of the opportunity to direct the attention of this Court to the reasons why the judgment below should be sustained on the merits.

We appreciate that this Court has a busy calendar but the issues of these cases are of substantial consequence to the private parties who litigate with the government. They may mean the difference between economic life and death.

The decision of this Court, as we did not believe it appropriate to show in our petition, would cause incalculable harm to Otis & Co. We did not point this out because this Court has stated that in deciding whether to grant certiorari, it is concerned only with issues of "importance to the public, as distinguished from that of the parties . . ." *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393, per Taft, C.J. Because of our belief in the limited nature of this Court's considerations on the issue of certiorari, we did not point out that the position urged by the SEC here involved an unwarranted extension of the *Myers* case. We were prepared to show on the merits that it was such an extension and that in the alternative if the *Myers* case was as broad as the government contended, that the time had come when the doctrine should be limited against abuse.

We further intended to show that the new Judicial Code, § 2283 shows a clear congressional intention that relitigation of decided issues should be enjoined. (This section of the Judicial Code reversed the decision of this Court in *Toucey* v. *New York Life Insurance Company*, 314 U. S. 118. See Reviser's Note to § 2283.) We also intended to show that Congress in the Administrative Procedure Act, 5 USC § 1001 et seq. indicated that abuses such as relitigation were no more to be tolerated in administrative agencies than in the courts. We intended to show the abuse, the injury and the intolerable burden of oppression which would result in the present case from permitting relitigation of issues already concluded. We intended to show the evil that would follow from remitting us to a hearing before the SEC, to years of litigation and expense, perhaps only at the end to face again in this Court the *res judicata* question, which the Court did not pass on in its summary reversal. Only then perhaps shall we know whether the entire proceedings taken in the interim have been a waste of time and energy of the private parties and of the government repeating the grave injustice involved in the lengthy and

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useless Federal Trade Commission proceedings in the *Lee* case. (*George H. Lee Co.* v. *F.T.C.*, 113 F. (2d) 583 (CCA 8, 1940)).

In addition, we wish to point out that, if the procedure adopted in this case is followed, no respondent's counsel will feel safe in filing the kind of short opposition brief filed in this case, but will, in justice to his clients, be required to argue the merits at length. The consequent increase in the size of petitions will involve a more substantial impediment to the speedy conclusion of the work of this Court, than the occasional necessity of hearing argument even where the merits seem clear to the Court from the face of the petition.

Respectfully submitted,

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Counsel for Respondent.

I hereby certify this petition is filed in good faith and not for purpose of delay.

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